No. 80-1205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
Petitioner,

v.

JANET CENANCE, *et al.*,
Respondents.

AMICUS CURIAE BRIEF OF THE CONSUMER BANKERS ASSOCIATION, AND THE NATIONAL CONSUMER FINANCE ASSOCIATION, AS *AMICI CURIAE*, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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List of Parties.

JANET CENANCE, *Plaintiff-Appellee,*

v.

BOHN FORD, INC., *Defendant-Appellant,*
FORD MOTOR CREDIT COMPANY, *Defendant-Appellant.*

NICOLE ANTONIO, *Plaintiff-Appellant,*

v.

CANAL MOTORS, INC., *Defendant,*
FORD MOTOR CREDIT COMPANY, *Defendant-Appellee.*

MARION SHROPSHIRE, *Plaintiff-Appellee,*

v.

GEORGE THOMPSON FORD, INC., *Defendant-Appellee,*

v.

FORD MOTOR CREDIT COMPANY, *Defendant-Appellant.*

SOLOMON WIGGS, *Plaintiff-Appellee,*

v.

FORD MOTOR CREDIT COMPANY, *Defendant-Appellant.*

JIMMY W. FARRELL, *Plaintiff-Appellee, Cross-Appellant,*

v.

FRANK JACKSON MOTORS, INC., d/b/a JACKSON AMC-JEEP, *Defendant-Appellant, Cross-Appellee.*

NICHOLAS STRZELECKI, *Plaintiff-Appellee,*

v.

TERRY FORD COMPANY and FORD MOTOR CREDIT COMPANY, *Defendants-Appellants.*

MICHAEL DUANE CULVER, *Plaintiff-Appellee,*

v.

GREENBRIAR LINCOLN MERCURY SALES, INC. and FORD MOTOR CREDIT COMPANY, *Defendants,*
FORD MOTOR CREDIT COMPANY, *Defendant-Appellant.*

DENNIS VISSICHELLI, *Plaintiff-Appellee,*

v.

TERRY FORD COMPANY and FORD MOTOR CREDIT COMPANY, *Defendants-Appellants.*

THOMAS J. ROGERS AND PHYLLIS ROGERS, *Plaintiffs-Appellees*,

v.

FRANK JACKSON LINCOLN-MERCURY and FORD MOTOR CREDIT COMPANY, *Defendants-Appellants.*

Nos. 77-2200, 77-3508, 78-2369, 78-2914, 79-1139, 79-1584, 79-2227, 79-2340, 79-2449 and 79-2672.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

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This *amicus curiae* brief, in support of the Petition for a Writ of Certiorari, is filed by *amici curiae* the Consumer Bankers Association, and the National Consumer Finance Association herein collectively referred to as the Associations. Written consent of the parties, to the filing of this brief, is filed with this brief in conformity with Rule 36.1 of the Rules of the Supreme Court of the United States.

INTEREST OF *AMICI CURIAE*

The Consumer Bankers Association (CBA) is a non-profit organization which was organized in 1919 to provide a voice for the retail banking industry. Since that time, the membership of CBA has grown to 360 commercial banks, of all sizes, which are actively engaged in extending consumer credit. Combined, the members of CBA hold over fifty-five percent of all consumer credit outstanding held by commercial banks. The CBA memberships' consumer credit outstandings total more than $72,000,000,000.

The National Consumer Finance Association (NCFA) is the nation's largest trade association serving the consumer finance industry. Founded in 1916, NCFA represents nearly 800 consumer finance and industrial banking companies operating more than 17,000 offices across the United States. NCFA's members hold about 90 percent of the $70 billion in outstanding consumer credit of that industry.

The business of CBA's and NCFA's members involves both making direct loans to consumers and purchasing retail installment sales contracts executed between consumer-buyers and creditor-sellers. The members of CBA and NCFA conduct business in every state in the nation. The Associations' membership's business is highly regulated, by both federal and state statutes and regulations, and is subject to the disclosure requirements of the Federal Truth in Lending Act (TILA)[1] and its implementing Regulation.[2]

The Associations have reviewed the Petitioner's Petition for a Writ of Certiorari and endorse the reasons set forth in the Petition for the granting of the Writ. The issues raised by this case have an impact beyond the scope of operation of the Petitioner corporation.

CBA's and NCFA's interest in the creditor identification issue and the disclosure obligations of multiple creditors is not of recent vintage. The Associations' collective membership has been adversely impacted, and continues to be adversely impacted, by the uncertainty caused by the decision below of the United States Court of Appeals for the Fifth Circuit. As chronicled in Appendix D of the Petition,[3] both

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[1] Truth in Lending Act, Pub. L. No. 90-321, Title I, 82 Stat. 146 (1968), as amended, 15 U.S.C. §1601 *et. seq.* (1974 & Supp. 1980).

[2] 12 C.F.R. Part 226 (1980) (designated "Regulation Z").

[3] *Petition For A Writ of Certiorari,* Appendix D at 104-05 (hereinafter *Petition*).

CBA and NCFA, since the issuance of the decision in *Meyers* v. *Clearview Dodge Sales Inc.*,[4] have been attempting to get corrected the Fifth Circuit's erroneous construction of TILA and Regulation Z. Thus, the Associations are vitally interested in having this Court grant the Petition for a Writ of Certiorari and accept for review the decision of the United States Court of Appeals for the Fifth Circuit.

The Associations are submitting this brief to provide arguments on the national importance of the issues raised in the Petition and on the widespread confusion and uncertainty that is the result of conflicting opinions issued by the United States Courts of Appeal on the very issues in this case.

The arguments presented in this brief address only the appropriate manner of creditor identification and the appropriate status of the parties in these types of financing transactions. This brief, as did the Petition, addresses only issues that have broad impact on, and are of wide implication for, financial institutions.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION.

There are, in general, two basic types of credit transactions which are subject to TILA. Each type of transaction is reflected by its own structural form. The first type is a direct loan where a consumer goes to a creditor, executes loan documents and receives the proceeds of the loan. The second type is retail credit or installment sale credit where a consumer purchases goods or services from a seller on credit, documents the transaction with an installment sales contract which the seller usually later assigns or sells to a financial institution.

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[4] 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977).

The responsibility for TILA disclosures is placed upon the creditor.[5] The time at which creditors must comply with their mandated responsibility is also specified in Regulation Z.

According to the Board of Governors of the Federal Reserve System (hereinafter the Board), at the end of October 1980, total outstandings of consumer installment credit was $305,452,000,000.[6] Of that total outstandings figure, commercial banks held $140,897,000,000 and finance companies held $74,985,000,000.

The Board's figures were further broken down by major type of credit outstanding of which automobile credit was the largest single category at $114,452,000,000. In the automobile credit category, commercial banks had outstanding a total of $60,145,000,000. That 60-plus billion dollars figure was further divided into two categories with $34,557,000,000 in purchased retail installment sales contracts and $25,588,000,000 in direct loans. Of the total automobile credit outstanding of 114-plus billion dollars, finance companies held $33,497,000,000.

Installment sales financing, that is, the purchase by commercial banks and finance companies (herein collectively, financial institutions) of dealer or retailer generated consumer credit contracts, evidencing the credit sale of consumer goods or services has been and is now, as suggested by the amount of such credit outstanding, a well-established practice and desired function of financial institutions. The process by which those financing obligations originate and are placed with financial institutions is as varied as the diversity of the participants in the market. However, although not exhaustive, as a general matter, these financing transactions reflect one of three basic forms.

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[5] 15 U.S.C. §1602(f); Regulation Z, §226.2(s) (defining "creditor").

[6] Board of Governors of the Federal Reserve System, 66 *Federal Reserve Bulletin,* A40 (December 1980). All of the "credit outstanding" figures discussed in this section of the brief are derived from the cited *Bulletin.*

Some dealers and retail sellers have their consumer customers fully execute the retail installment sale contracts, the sellers make the required disclosures, receive the customers' obligation made out in favor of themselves and consummate the credit sale transactions. The dealer or retailer then either sells the individual contracts or assembles packages of such obligations of varying quality and negotiates the sale of the packages with different financial institutions on a weekly, monthly, or other time period depending on cash needs and business practice. This form of transaction is a pure credit sale between the seller, as an extender of credit, and the consumer buyer. That initial buyer-seller transaction is followed by a subsequent assignment or sale of the contracts to a financial institution. This second transaction between the seller and the financial institution is a commercial finance transaction.

There is a second form that the general factual pattern of these transactions may take. There the dealer or retail seller discusses the terms of a cash sale with his potential customer, the consumer-buyer. The dealer or retail seller and his potential customer reach agreement on the essential terms of the cash sale. Then, the consumer may be referred to one or more specific financial institutions. At the financial institution's office, after agreement on the terms of financing, its personnel, in direct contact with the consumer, consummate the credit transaction by filling out loan papers and the required loan disclosure documentation.

In the above form of the transaction, the consumer-buyer uses the proceeds of the loan to pay the seller for the purchase. Since in this form of the transaction, the financial institution directly extends credit to the consumer, it knows the terms of the credit extension and it is equitable to impose on it, as Regulation Z does, the requirement to make loan disclosures.[7] If the seller arranges for the extension of credit,

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[7] The reason that Regulation Z provides a financial institution which extends credit the option to make loan disclosures rather

by participating in the preparation of contract documents, it may thereby fall within the definition of a creditor and become obligated to make the appropriate disclosures.[8]

There is a third form that these financing transactions may take. In this form the originating dealer or retail seller negotiates with the consumer the terms of the credit sale including price, downpayment, payment schedule, finance charge and other credit terms. Before consummating the credit sale, the dealer, for purposes of having the buyer's credit checked and approved, submits the buyer's credit application to a third party financial institution that *may* later become a purchaser of the installment sales contract. This procedure is called pre-clearing or pre-approval of a consumer's creditworthiness.

After the consumer-buyer's credit has been reviewed, the financial institution merely indicates to the credit seller whether or not the seller's contemplated consumer debtor's creditworthiness falls within the range of risk that the financial institution would, as a potential contract purchaser, find acceptable. After communication with the financial institution, the seller and the consumer-buyer either renegotiate the credit terms or consummate the credit sale transaction by executing the retail installment sales contract and by making the underlying obligation payable to the seller of the product or service. The executed retail installment sales contract is later offered for sale to either a specific purchaser or one of several potential contract purchaser financial institutions.

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than credit sale disclosures is that in a credit sale, in addition to all of the information that is disclosed in the consumer loan context, the total cash price, the downpayment and the unpaid cash balance must be disclosed to the consumer. Typically, the latter three items are not known by either a lending or contract purchasing financial institution.

[8] Regulation Z, §§226.2(h), 226.2(s) and 226.6(d).

The characteristics of the above form of transaction are those of credit sales. Even though these transactions have caused confusion in the courts, they are transactions in which there is only one extender of credit, the seller, and the transactions should be disclosed as credit sales. The consolidated cases in this Petition fit squarely within the above form of credit sale transaction.

However, the recharacterization theory as applied by the Fifth Circuit has caused financial institutions, engaging in one or another form of the previously described forms of installment sales financing, substantial uncertainty as to their disclosure obligations and concurrently exposed those same institutions to potentially staggering civil liability.[9]

Conflicting judicial decisions have confused both creditors and subsequent assignees as to who should, and

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[9] Retail sellers and dealers obtain disclosure forms almost exclusively from potential contract purchaser subsequent assignees. Due to the combination of the number of transactions involved, the use of detailed disclosure forms, and the widespread distribution system for forms, *any* change in the law that affects a consumer credit form, including a disclosure change, triggers a substantial changeover process. The extensive process involved must be undertaken with respect to *each* change in the law and *each* affected form.

That changeover process includes legal analysis; review of the suitability of the change for personnel who complete the form; printing new forms; physical distribution of the forms often to a number of different locations, and the retrieval and destruction of obsolete forms; and personnel retraining necessitated by the change. This case illustrates well the problems caused to financial institutions, such as the Petitioner, that finance installment sales on a nationwide basis. If this Court permits this decision of the Fifth Circuit to go unreviewed, the Petitioner's disclosure forms that have been specifically approved by the Sixth, Seventh, and Ninth Circuits would for future use in the Fifth Circuit, have to go through the cumbersome and expensive change process described in this footnote.

with which requirements of TILA, they should comply. The concomitant result of this judicially injected uncertainty is to frustrate Congressional intent, as expressed in the TILA, by denying to consumers uniformly comparable credit information. Therefore, this Court should accept this Petition for a Writ of Certiorari to review the Fifth Circuit's judicially mandated disclosures which are contrary to the TILA, Regulation Z, and the announced position of the Federal Reserve Board's staff.

II.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO SETTLE THE REOCCURRING QUESTION OF WHETHER OR NOT A FINANCIAL INSTITUTION WHICH ACQUIRES A RETAIL INSTALLMENT SALES CONTRACT BY SUBSEQUENT ASSIGNMENT IS IN FACT A CREDITOR AT THE TIME THAT THE UNDERLYING CREDIT TRANSACTION BETWEEN THE SELLER AND THE CONSUMER IS CONSUMMATED.

There is a conflict between the Fifth, Sixth, Seventh and Ninth Circuits on the question of whether a subsequent assignee of a retail installment sales contract must be identified, on the face of the disclosure statement, as an original extender of credit using the particular terminology "creditor" at the time that a credit sale between the seller and consumer is consummated.[10] The underlying issue, and more importantly, the question which should be resolved by this Court is whether or not a financial institution which acquires a retail installment sales contract by subsequent assignment is in fact a creditor at the time that the underlying credit transaction between the seller and the consumer is consummated. Con-

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[10] *Petition* at 11-14. The Associations endorse and agree with the Petitioner's analysis of the cases there cited, and therefore will not repeat that reasoning.

sidering the identified dollar magnitude of such financing which is outstanding,[11] this Court's response to that question is of staggering consequence.

In the instant cases the Fifth Circuit reached the conclusions that the subsequent assignee was in fact an original creditor and that it should have been disclosed as such on the TILA disclosure statement. The Court's erroneous conclusions are predicated, first, on a recharacterization of the status of the subsequent assignee to that of a creditor, and second, on analysis that melds the previously well-established and legally recognized distinctions between credit sales and loan transactions.[12]

The transactions here at issue, as do many other similar credit sales by sellers, followed a disclosure format that is mandated by the express language of the Statute and Regulation read as a whole. The TILA and Regulation Z scheme mandates that these transactions be disclosed as credit sales.

As the previous discussion of the sales finance industry's practice indicates, when a credit sale is consummated there is only one credit extender and no credit arranger. In credit sale transactions, the seller is the party on whom Regulation Z places responsibility for making the required disclosures.

Furthermore, scrutiny of Regulation Z's disclosure timing sequence, contrary to judicial opinions which have not considered its practical implications, leaves no doubt that a creditor must in fact be in existence as a creditor within the purview of a particular transaction in order for it to have any disclosure obligations whatsoever. In both retail installment sales and loan transactions the disclosures must be made either at or prior to consummation.[13]

In the retail installment sales context, before the transaction is consummated there is only one party capable of knowing what credit sale terms and conditions are in need of disclosure and it is that same party who is physically capable

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[11] *Supra* note 6.

[12] *See* pp. 13-14, 18 *infra.*

[13] Regulation Z, §§226.6(a) and 226.8(a).

of delivering the disclosure statement to the consumer. That party is the seller. It is for those practical reasons that Regulation Z places responsibility for credit sale disclosure violations on the seller.[14]

The Fifth Circuit's decision in the instant cases followed, in most respects, that Court's prior decision in *Meyers* v. *Clearview Dodge Sales, Inc.*[15] The precursor of the *Meyers* decision was a group of cases which became known as the health club cases.[16] In those cases, in order to achieve a truth in lending result the courts stretched the principles underlying the TILA.

The general fact pattern in those cases were that the defendant health spas would charge their customers a set fee regardless of whether the customers' payments were immediate and in cash or paid in installments. Because of the four installment rule,[17] the defendants in those cases were required to provide TILA disclosure statements. On the disclosure forms, for finance charge, the defendants had listed "none," and had listed "0%" for the annual percentage rate. The installment sales contracts were then sold to financial institutions.

The courts, applying a conduit theory, agreed with the consumers' claims that in reality, those unitary price contracts were retail installment sales contracts for which the consumers were charged a finance charge at an annual percentage rate based upon the difference between the unitary price charged the consumer, and that price as discounted by the financial institution which subsequently had purchased the installment sales contracts. The courts' underlying concern was that the true cost of the credit was being concealed from the consumer-

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[14] Regulation Z, §226.6(d).

[15] 539 F.2d 551 (5th Cir. 1976).

[16] *Garza* v. *Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972); *Kriger* v. *European Health Spa, Inc.*, 363 F. Supp. 334 (E.D.Wis. 1973); *Joseph* v. *Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D.Mo. 1971), 386 F. Supp. 780 (E.D.Mo. 1974), *rev'd* 532 F.2d 86 (8th Cir. 1976).

[17] 15 U.S.C. §1602(f); Regulation Z, §226.2(s).

customers by burying the cost of the credit in the cost of the sold goods or services. Therefore, the courts fashioned a conduit theory premised on recharacterization of the subsequent assignees' status to that of a creditor in order to preclude the perceived abusive creditor activity.

In considering the applicability of the health club cases to the question of how financial institutions that finance installment sales ought to be treated with respect to TILA disclosure responsibility and liability, it should be noted that their primary thrust was to force what the courts felt was in reality a hidden credit transaction with a buried finance charge to be so identified, and the requisite disclosures to be made. While the response of those courts to situations in which they felt consumers had been provided insufficient information is understandable, the additional recharacterization there of unitary priced installment sales from "four installment" transactions requiring limited disclosures to credit sales, requiring disclosure of finance charges and annual percentage rates, has directly led to the present confusion on the issue of who is the credit extender that must be identified as the creditor on the TILA disclosure statement.

The Fifth Circuit did not recognize the limitation of the rationale of the health club cases and in *Meyers* expanded that rationale beyond the unitary pricing situation and applied it to an issue on which there is neither potential for nor any actual abuse of the purposes underlying the TILA and Regulation Z.[18] Disclosure, on the face of retail installment sales contracts, of the identity of a potential subsequent assignee of such contracts is not required by any provision of either TILA or Regulation Z. Disclosing a potential subsequent assignee's identity, as a creditor, does not provide a consumer with any information which could be used in comparison shopping for credit and in making an informed decision on the use of credit.[19]

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[18] *Meyers*, 539 F.2d at 516, citing *Joseph* v. *Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976).

[19] It has been held, as a matter of law, that identifying on the disclosure statement a potential assignee to whom the contract was

III.

THE PETITION SHOULD BE GRANTED IN ORDER THAT THIS COURT MAY RECONCILE THE CONFLICT BETWEEN THE CIRCUITS ON THE DISCLOSURE OBLIGATIONS OF MULTIPLE CREDITORS.

The Associations agree with the Petitioner's position and its analysis that there now exists a conflict among the Circuit Courts on the specific disclosure responsibilities of multiple creditors in installment sales financing transactions.[20]

The Associations wish to highlight the confusion caused by the conflict in judicial opinions on what specific type of disclosures should be made by the party with the obligation for disclosure.

The Fifth Circuit itself has not been consistent in providing guidance to good faith efforts at compliance by financial institutions attempting to distill, from a myriad of conflicting opinions, what disclosures are mandated in the context of a transaction which is structured as a credit sale to a consumer followed by a subsequent assignment of the retail installment sale contract to a financial institution.

In the Fifth Circuit's previous decision on what specific type of disclosure should be made by a recharacterized subsequent assignee it held that such an assignee *must* make a joint credit sale disclosure with the seller.[21] The Fifth Circuit's lack of internal consistency and its own confusion is demonstrated by its decision in the instant cases. The District Courts both in *Cenance* v. *Bohn Ford, Inc.*,[22] and in *Antonio* v. *Canal*

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not later assigned violated section 226.6(c) of Regulation Z as being misleading. *Clausell* v. *Abraham Lincoln Mercury, Inc.*, Civil Action No. 79-1139 (E.D.La. July 22, 1980), (Reprinted as Appendix E of the *Petition*, at 110-12).

[20] *Petition* at 14-17, and 24-26. *Compare Meyers*, 539 F.2d at 521 *with Joseph* v. *Norman's Health Club, Inc.*, 532 F.2d at 93.

[21] *Meyers*, 539 F.2d at 521, n.22.

[22] 430 F. Supp. 1064 (E.D.La. 1977).

Motors, Inc.,[23] phrased the language of their opinions in mixed credit sale and loan terminology.

The Fifth Circuit's consolidated decision in this case is cast in loan terminology. However, the Fifth Circuit did not expressly indicate what type of disclosures, credit sale or loan, the recharacterized subsequent assignee should have made. The Fifth Circuit's use of loan terminology in *Cenance* indicates that in this case that Court blurred the distinction, expressly recognized in both TILA and Regulation Z, between credit sales and loans. That conclusion is supported because the Court nowhere in its opinion expressly addressed whether the recharacterized subsequent assignee should have made a joint credit sale disclosure with the seller, whether the subsequent assignee should have made a separate credit sale disclosure, or whether the recharacterized subsequent assignee should properly have made loan disclosures.

The Fifth Circuit based its holding that the Petitioner was an original credit extender and that it had violated Regulation Z, section 226.6(d), on a portion of the first sentence of that section.[24]

However, the substantive separate charge itemization violations at issue in these cases were alleged violations of Regulation Z, section 226.4(b). The items requiring disclosure under Regulation Z, section 226.4(b) are typically items that are within the knowledge and purview of a credit extender's personnel as they document the disclosures necessary to consummate a credit transaction. Thus, further support is provided for the conclusion that as a corollary to recharacterizing the status of the parties the Court also, possibly without a full appreciation of the implications of its action, melded the distinction between credit sales and loan transactions as demonstrated by the following:

> Although . . . (15 U.S.C. section 1614) does address the liability of subsequent assignees, the appellants' argument begs the question of whether Ford is truly a "subsequent assignee" in substance rather than form. Simply

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[23] Civil Action No. 74-3163 (E.D.La. November 18, 1977).

[24] *Cenance* v. *Bohn Ford, Inc.*, 621 F.2d 130, 134 (5th Cir. 1980).

> denominating oneself as a subsequent assignee is insufficient. To enjoy the protection of the new provision, the company must be subsequent assignee in fact as well as name. Thus, the status of a *loan participant* is determined by the nature of the participation rather than a designation arbitrarily shown on the *loan* instrument.[25] (Emphasis added).

These decisions from within the Fifth Circuit provide no guidance to financial institutions attempting to comply with TILA and Regulation Z disclosure requirements. The lack of specificity in the court decisions have imposed confusing and conflicting requirements for both creditors and subsequent assignees to comply with and does not benefit consumers who are in need of uniform credit disclosure statements.

This Court should accept this Petition and resolve the conflict between the Circuits, and provide guidance to the Circuits in fashioning disclosure requirements which are consistent with the TILA and Regulation Z.

IV.

THE PETITION SHOULD BE GRANTED IN ORDER FOR THIS COURT TO CONFIRM THE DEFERENCE TO BE ACCORDED TO THE INTERPRETATIONS OF THE FEDERAL RESERVE BOARD.

A. The Federal Reserve Board Has Articulated Consistent Criteria For The Determination Of Creditor Status.

The Federal Reserve Board, in implementing its Congressional mandate,[26] has provided specific guidance on who is a creditor in particular types of credit transactions. In providing its guidance, the Board has first looked to determine who the parties are to a particular consumer credit transaction. In deciding whether someone is a party to a consumer credit transaction, the Board seeks to determine that party's status at a particular point in time.

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[25] *Id.*

[26] 15 U.S.C. §1604.

As far as the Board is concerned, the relevant point in time is that time at which a transaction, either credit sale or loan, is consummated. The time at which a creditor obligates itself to extend credit and its customer obligates himself to utilize that credit is the point in time at which the consumer credit transaction has been consummated.[27] Thus consummation occurs at the moment that a contractual relationship is created between a creditor and its customer.[28] The determination of the existence of a creditor-customer contractual relationship depends on underlying state law.[29]

Once consummation has occurred, the Board's interpretations have examined the specific roles played, at consummation, by each party. The Board looks to whether a seller or dealer, by its activities in relationship to a specific transaction, qualifies as an arranger of credit to be extended by a third party.[30] In determining whether a seller is an arranger of credit, or in fact the true extender of credit at the time a credit sale is consummated, the Board examines whether, at consummation, the credit seller knows to whom, when, and if the underlying retail installment sales contract will be sold.[31]

As the description of the retail installment sales financing industry's practice indicated, at the time credit sales are consummated, the seller does not know if, when, or to whom the underlying contracts will ultimately be sold. In those circumstances, the Board's tendency has been to indicate that

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[27] FRB Public Information Letter No. 344, [1969-1974 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 30,399 (June 4, 1970); FRB Public Information Letter No. 778, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,100 (April 10, 1974).

[28] Regulation Z, §226.2(kk).

[29] FRB Public Information Letter No. 344, *supra* note 27.

[30] Regulation Z, §226.2(h); FRB Public Information Letter No. 778, *supra* note 27; FRB Public Information Letter No. 823, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,145 (July 24, 1974).

[31] FRB Public Information Letter No. 626, [1969-1974 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 30,875 (August 10, 1972).

there was only one extender of credit, the seller, at consummation of such transactions.[32]

B. The Fifth Circuit Has Ignored This Court's Precedent Of Ford Motor Credit Company v. Milhollin.

The decisions of the Fifth Circuit, both in this case, and in *Meyers,* substituted judicial disclosure policy in place of the disclosure policy articulated by the Federal Reserve Board's staff. In so doing, the Fifth Circuit rejected the informed and fundamentally consistent interpretation of Regulation Z by the agency charged by Congress with the primary role of interpreting the Statute and Regulation.

In addition to the rejection of the Congressional mandate, the Fifth Circuit ignored the precedent of *Ford Motor Credit Company* v. *Milhollin,*[33] wherein this Court, last term, confirmed the Congressional mandate and articulated the standard of deference to be accorded to the Federal Reserve Board staff's interpretation of Regulation Z. This Court should accept this Petition and confirm the standard of deference to be accorded to the pronouncements of the Federal Reserve Board's staff.

V.

THE PETITION SHOULD BE GRANTED IN ORDER FOR THIS COURT TO PREVENT THE FIFTH CIRCUIT FROM JUDICIALLY RESTRUCTURING LONG STANDING INDUSTRYWIDE PRACTICE OF THE RETAIL INSTALLMENT SALES FINANCING INDUSTRY.

A. The Effect Of The Fifth Circuit's Decision Would Require Changes In The Retail Installment Sales Financing Industry's Business Practice.

In addition to the potential liability and costs associated with the litigation that the combination of the *Meyers* and *Cenance* holdings are producing, those decisions will force financial institutions that are purchasing retail installment

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[32] *Id.*

[33] 444 U.S. 555 (1980).

sales contracts to alter their long-established commercial practice.

At the time that TILA disclosures must be made, sellers and dealers do not know with certainty which among many potential assignees will ultimately purchase a particular retail installment sales contract. Sellers consummate a credit sale transaction with the consumer and then, even if they have previously received pre-approval of a consumer's creditworthiness from one financial institution, they negotiate the sale of the specific installment sale contract among many financial institutions. If, as the *Cenance* decision requires, the identity of a potential future purchaser of retail installment sales contracts has to be disclosed as a creditor on the seller's TILA disclosure statement, credit sellers' practices of negotiating the ultimate sale of installment contracts with more than one financial institution will, out of necessity, have to be abandoned.

The superficial statutory and regulatory analysis engaged in by the Fifth Circuit did not consider the implications of the disclosure mandated by *Meyers* and the specific terminology for that disclosure mandated by *Cenance*. However, other courts, which have considered the same arguments as advanced by consumers to the Fifth Circuit, have considered the practical marketplace ramifications of implementing their holdings. Those courts have asked themselves whether, if a financial institution was identified on a disclosure form as a creditor and as an assignee or whether if a financial institution had separately disclosed itself as a creditor, they would now be faced with the contentions that the status of the financial institution had been ambiguously disclosed, or the contention, in the event of separate disclosures, that the disclosures were inconsistent or not made on the face of one document.[34]

Those questions are not speculative but rather epitomize the pitfalls inherent in the TILA and Regulation Z. As the

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[34] *Sharp* v. *Ford Motor Credit Company*, 452 F. Supp. 465, 468 n.5 (S.D.Ill. 1978), *aff'd* 615 F.2d 423 (7th Cir. 1980).

Clausell[35] decision indicates, some courts will not consider the practical marketplace consequences of their decisions. Thus, as a result of the *Meyers* and *Cenance* decisions, the doors are now wide open to litigation that would, if not checked by this Court's intervention, sacrifice the substance of the TILA to form, and which would tend to cloud the necessary distinction between the concepts of retail installment sales financing and lending.

B. The Effect Of The Fifth Circuit's Decision Would Require Changes In The Structural Form Of The Retail Installment Sales Financing Industry.

The Fifth Circuit failed to recognize that the purchase of retail installment sales contracts as a method of financing is consciously structured in that form for reasons that lie outside the purview of the underlying purpose of TILA and Regulation Z.

Plaintiffs in TILA cases, where the underlying transactions have been credit sales, have been asking the courts to recharacterize the transactions as loans, and have contemporaneously been pleading violations of states' usury laws. Those same plaintiffs urge the federal courts to accept jurisdiction of such claims, in the course of TILA cases, on the basis of pendent jurisdiction in the federal courts to hear such claims.[36]

Although the federal courts have not been inclined to accept such pendent jurisdiction, state courts have concurrent jurisdiction over alleged TILA disclosure violations.[37] State courts have subjected financial institutions to the recharacterization of the underlying transaction theory.[38]

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[35] *Supra* note 19.

[36] *See Price* v. *Franklin Investment Company,* 574 F.2d 594, 596 (D.C. Cir. 1978).

[37] 15 U.S.C. §1640(e).

[38] *Glaire* v. *LaLanne-Paris Health Spa, Inc.,* 12 Cal. 3d 915, 117 Cal. Rptr. 541, 528 P.2d 357, 363 (1974).

Thus, when a federal court renders a TILA decision, even though erroneous, recharacterizing an underlying credit transaction to something other than that denominated by the form adopted by the parties to the transaction, that decision may have persuasive spill over impact on any subsequent state court litigation.[39]

The Fifth Circuit has not given consideration to the underlying substantive state laws which regulate retail installment sales. These laws distinguish between loans by lenders and credit sales by retail sellers and generally provide for different rates of charge for each type of transaction. Certain states have usury statutes which impose a lower interest rate on consumer loans than the permitted finance charge on retail installment sales.[40] When, in the TILA context, a transaction which had originally been structured as the purchase of a retail installment sales contract is recharacterized as a loan transaction, that recharacterization almost certainly means that the finance charge actually imposed in the transaction, on the basis of the rate permissible for credit sales, exceeds the usury statute's interest rate permitted to be charged on loans. Therefore, the finance charge rate for the transaction as recharacterized violates that particular state's usury laws.

However, what the courts that have purported to look through the form of a credit sale to determine whether it is in substance a loan, and therefore subject to the usury statute, have not realized is that they are looking through form not to substance but merely to another kind of form.[41] If permitted

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[39] *Glaire,* 528 P.2d at 362-63 citing the health club cases.

[40] *Compare* Md. Comm. Law Code Ann. (1975) §§12-102, 103 (interest rate ceilings) *with id.* §§12-609, 610 (maximum finance charges); *and compare* Ga. Code Ann. §§57-101, 116 (interest rate ceilings) *with id.* §96-903(d) (maximum finance charges).

[41] Warren, *Regulation of Finance Charges in Retail Instalment Sales,* 68 Yale L.J. 839, 849 (1959).

to flourish, that type of indiscriminate judicial application of usury statutes to credit sales would constrict the flow of capital into the installment sales financing industry. In order to prevent such an occurrence, this Court should confirm the soundness of the established statutory distinctions between retail installment sales financing and lending.

CONCLUSION

The decision of the Fifth Circuit furthers a judicial disclosure policy that is squarely contrary to the TILA and to Regulation Z and interpretations issued by the Federal Reserve Board. This Court should accept the Petition in order to eliminate the conflict in the Circuits on the creditor identification issue and to eliminate the conflict on the disclosure obligation of multiple creditors. More importantly, this Court should address the question of whether or not a subsequent assignee is a creditor at the time that a credit sale is consummated between a seller and a consumer. In answering that question, this Court should provide definitive guidance to the Circuits on the impermissibility of judicially restructuring the retail installment sales financing industry.

Respectfully submitted,

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